

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ANGEL RIVERA,)
Petitioner,)
)
v.)
)
JOHN ASHCROFT,)
Respondent.)
)

CIVIL ACTION
NO. 05-10629-JLT

**RESPONSE TO ORDER TO SHOW CAUSE AS TO
WHETHER PETITIONER IS "IN CUSTODY" PURSUANT TO 28 U.S.C. §§ 2241 & 2254**

In an order dated May 10, 2005, this Court outlined the governing law regarding the petitioner's failure to demonstrate that he is in custody. See Angel Rivera v. John Ashcroft, No. C.A. 04-12731-JLT (May 10, 2005). There, the Court recited the law as follows:

Section 2254 provides that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a) (emphasis added). Thus, "[t]he first showing a § 2254 petitioner must make" is that he is "in custody pursuant to the judgment of a State court." Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394, 403-404 (2001) (quoting 28 U.S.C. § 2254). The "in custody" language of the federal habeas statutes, 28 U.S.C. §§ 2241, 2254, is jurisdictional and requires habeas petitioners to be in custody under the conviction or sentence they attack when they file the petition. Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (per curiam); Fernos-Lopez v. Figarella Lopez, 929 F.2d 20, 23 (1st Cir. 1991).

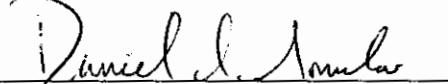
Once a prisoner's sentence expires, he is no longer "in custody" under that conviction sufficient for the court to exercise jurisdiction to hear a habeas petition under § 2254. Lackawanna, 532 U.S. at 403-04. Further, "the collateral consequences of that convictions are not themselves sufficient to render an individual 'in custody.'" Maleng, [4]90 U.S. at 492. It is well-settled that deportation proceedings are collateral, rather than direct, consequences of a criminal conviction. See United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); Nunez Cordero v. United States, 533 F.2d 723, 726 (1st Cir. 1976); see also Kandiel v. United States, 964 F.3d 794, 796 (8th Cir. 1992) (collecting cases). [footnote omitted]. Thus, a petitioner detained by the BICE as a result of a conviction whose sentence has already expired is not "in custody" for purposes of filing a § 2254 petition attacking the conviction. Broomes v. Ashcroft, 358 F.3d 1251, 1254 (10th Cir.), cert. denied, 73 U.S.L.W. 3353 (2004); Fordjour v.

Stewart, 2003 WL 22416689 at *1 (N.D. Ca. Oct. 20, 2003) (Chesney, J.); Cuevas v. New York, 2002 WL 206985 at *2 (S.D.N.Y. Feb. 11, 2002) (Sweet, J.); Neyor v. I.N.S., 155 F. Supp. 2d 124, 134 (D.N.J. 2001).

Angel Rivera v. John Ashcroft, No. C.A. 04-12731-JLT (May 10, 2005). As the attached documents from the Plymouth County Correctional Facility and the Massachusetts Department of Correction demonstrate, the petitioner completed his state sentence on September 13, 2004, and is currently being detained by the Bureau of Immigration and Customs Enforcement. See Exhibits A, B. Consequently, the petitioner is not "in custody" pursuant to 28 U.S.C. § 2254, and this Court is without jurisdiction to hear his claim.

Respectfully submitted,

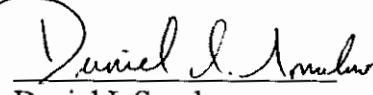
THOMAS F. REILLY
Attorney General


Daniel I. Smulow, BBO # 641668
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2949

Date: June 9, 2005

Certificate of Service

I hereby certify that a true copy of the above document was served on Angel Rivera, Plymouth County Correctional Facility, 26 Long Pond Road, Plymouth, MA 02360, by first class mail, postage prepaid, on June 9, 2005.


Daniel I. Smulow

E X H I B I T A



Plymouth County Correctional Facility

Inmate Summary

RIVERA-MARTINEZ, ANGEL YUANIS

 16 WILMOTT ST
 LAWRENCE, MA
 (978) 689-4745

 Detainers Outstanding: None
 Class Level: Pre-Trial
 Housing: C3

 Booking # 404172
 Inmate ID 38506
 DOB 1964/01/10
 AGE 41
 SSN 017-62-3482

Room: 412 Bed: 1


Commitment Info

Next Court Dt: 2005/01/28

Committed By: I.N.S. Boston

Commit Date: 2004/09/13

Full Time:

Pre-Arrgn
Booking Code:
SAFEK

Disposed To: I.N.S. Boston

Arrested By:

Arrest Date:

End of Sntnc:

Eff.:

PED:

Ref#: A37155411

Sentence:

SID:

Alternate ID: CLASS 3

FBI:

Ref# A37155411

Offense

Offense Type

Statute

Bail

IMMIGRATION HOLD

No Bail

Personal Info

Sex: M Hair: BRO Eyes: BRO Hgt: 5'9"

Wgt: 180 Race: HIS

Ethnicity: HIS

Hair Length: SHT Teeth: NRM Handed: R

Build: MED Speech: LAC

Language: SPN

Skin Ton: OLV Marital Sts: S Children: 3

Religion: CRS

Education: HD

Military: NSR Occu.: insurance sales

POB: santo domingo

Citizen: DOMINICAN REPUBLIC

Self Reported Physical

GOOD

Scars, Marks, Tattoos:

Special Needs:

Warrant Info:

Family Info

Spouse:

Phone:

Mother: martinez, elvira

Phone:

Father: rivera, nicolas

Living

Phone:

Emergency: rivera-garcia, ingrid

Living

same, same, MA

Phone: (978) 686-4745

SISTER



Plymouth County Correctional Facility

Inmate Summary

Supplemental Information

RIVERA-MARTINEZ, ANGEL YUANIS

16 WILMOTT ST
LAWRENCE, MA

Booking #: 404172

Alerts

Notifications:

Risk Types:

Special

Management:

Alias Information

Name: DOB: SSN: Comments:

Enemies

Name: Inmate ID: Comments:

Detainers

Type: Agency: Status: Expiration:

Restraining Orders

Type: Plaintiff: Start Date: End Date:

E X H I B I T B

Inmate Sentence Listing

W62790

RIVERA, ANGEL

Report Date: 2005 0609 09:27:59

Sentence Unit: A

Sent #: 1 Statute: 1ST 265 22A 320
 RAPE OF CHILD UND 16; USE OF FORCE (1ST)

Off. Date: 19951001
 Sent. Type: State Prison PE: 20050528
 Imposed: 19970606 Min: 20050528
 Invoked: 19970606 8Y TO 8Y 1D Max: 20050529
 Jail Credit: 8 Gcd:
 Effective: 19970529
 Court: ESSEX SUP CRT-NEWBURYPORT
 Docket: 96832

Statutory good Time Restrictions.

Sent #: 2 Statute: 1ST 265 22A 320
 RAPE OF CHILD UND 16; USE OF FORCE (1ST)

Off. Date: 19951001
 Sent. Type: State Prison PE: 20050528
 Imposed: 19970606 Min: 20050528
 Invoked: 19970606 8Y TO 8Y 1D Max: 20050529
 Jail Credit: 8 Gcd:
 Effective: 19970529
 Court: ESSEX SUP CRT-NEWBURYPORT
 Docket: 96834

Statutory good Time Restrictions.

Sent #: 3 Statute: 1ST 265 13B 331
 INDECENT A&B ON CHILD UNDER 14 (1ST)

Off. Date: 19900601
 Sent. Type: State Prison PE: 20000128
 Imposed: 19970606 Min: 20010528
 Invoked: 19970606 4Y TO 5Y Max: 20020528
 Jail Credit: 8 Gcd:
 Effective: 19970529
 Court: ESSEX SUP CRT-NEWBURYPORT
 Docket: 96837

Statutory good Time Restrictions.

Inmate Sentence Listing

W62790

RIVERA, ANGEL

Report Date: 2005 0609 09:27:59

Sentence Unit: A

Sent #: 4	Statute:	1ST 265	13B	331
INDECENT A&B ON CHILD UNDER 14 (1ST)				
Off. Date:	19951001			
Sent. Type:	State Prison			
Imposed:	19970606			
Invoked:	19970606	4Y TO 5Y		
Jail Credit:	8			
Effective:	19970529			
Court:	ESSEX SUP CRT-NEWBURYPORT			
Docket:	96838			

Statutory good Time Restrictions.

Paroled	Revoked	Returned	Escaped	Returned	
Combined dates as of					20040927 13:44
Time on parole:	0		Original	Revised	Adjusted
Dead time (parole):	0		PE Date :	20050528	20040912
Dead time (escape):	0		Minimum :	20050528	20040912
Earned time:	257.50		Maximum :	20050529	20040913
Forfeitures:	.0		GCD Date:		
Restorations:	.0				

Massachusetts Department of Correction - VSTAT - General - W_ADMIN_GVSTAT Report on Thursday
June 9, 2005 09:30

Select Inmate Commitment Number		Name	Comm #	Status	Unit, Cell, Bed	Sec. Level	Comm	
W62790	ANGEL	RIVERA	W62790	RELEASED	UNASSIGNED	4	19970606	200
Photo Image								